

ESTATE OF ANTOINE (KE NAPE) HILL

IBIA 78-15 (Supp.)

Decided July 21, 1980

Appeal from an order by Administrative Law Judge Keith L. Burrowes, concerning the Nez Perce Inheritance Act.

Modified.

1. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Nez Perce Tribe: Generally--Indian Tribes: Enrollment

The original power to determine membership, including adoption, is in the tribe. After approval of an individual for membership, a tribe retains the power to disenroll provided it follows provisions for termination of enrollment contained in its membership ordinance.

2. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Nez Perce Tribe: Generally

The Administrative Law Judge acted properly in relying on one of two dates stipulated to by the parties regarding a valuation date for the acquisition of land under the Nez Perce Inheritance Act.

3. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Nez Perce Tribe: Valuation Reports

Neither the Administrative Law Judge nor the Board is bound by the Bureau of Indian Affairs' report and findings contained therein. Instead consideration will be given to the complete record in arriving at a determination as to fair market value.

APPEARANCES: Jay R. Kraemer, Esq., for appellant, Nez Perce Tribe; Steven C. Rice, Esq., for appellee, Cleo Frances Hill.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The above-captioned matter is before the Board on appeal from the Order and Discussion, Findings of Fact, and Conclusions of Law entered by Judge Burrowes on May 2, 1978.

By order dated January 23, 1979, hereto attached, the Board determined that the rules and regulations concerning the Nez Perce Inheritance Act which were published on August 30, 1974, effective September 30, 1974, were not controlling in the probate of the subject estate. The Board further found that the question of Ms. Hill's tribal enrollment was within the jurisdiction of the Commissioner of Indian Affairs to decide, and that Judge Burrowes was without jurisdiction to resolve the issue.

[1] The matter concerning tribal enrollment was referred to the then Acting Commissioner of Indian Affairs on January 23, 1979, for expeditious resolution and return.

On May 29, 1979, Martin E. Seneca, Jr., Acting Deputy Commissioner of Indian Affairs, issued a decision proposing to approve Tribal Resolution NP 76-210 adopting Cleo Hill into membership in the Nez Perce Tribe on the ground that Resolution NP 76-400 was based upon erroneous information and that the Portland Area Director had full authority to approve the resolution as an exception to the Nez Perce adoption requirements.

The Acting Deputy Commissioner further determined that the Tribe could if it so decided disenroll Ms. Hill by following the provisions for termination of enrollment contained in Section 4 of the membership ordinance.

The Tribe on June 26, 1979, adopted Resolution NP 79-506 which in substance resolved that it was undesirable to adopt members into the Tribe as an exception to Resolution NP 74-165 which provides that no person shall be eligible for membership by adoption into the Nez Perce Tribe who previously relinquished membership in the Nez Perce Tribe of Idaho. 1/

1/ The decision of Martin E. Seneca, Jr., Acting Deputy Commissioner of Indian Affairs, dated May 29, 1979, disclosed that Cleo Hill, born 1955, was enrolled with the Yakima Tribes by her father, Wilbur Hill, on November 14, 1956; that the 1957 Nez Perce Tribal roll contained the name of Cleo Hill; that being advised of the dual enrollment status of Cleo Hill, Wilbur Hill, on May 20, 1958, executed a relinquishment form withdrawing Cleo Hill's name from the Nez Perce Tribal roll; the Nez Perce Tribe by Resolution NP 58-108 requested the Commissioner to delete Cleo Hill's name from the Nez Perce Tribal roll; and on August 11, 1958, Resolution NP 58-108 was approved by the Acting Deputy Commissioner.

By letter decision dated February 5, 1980, Acting Deputy Commissioner, Theodore C. Krenzke, determined that the adoption of an individual into the Nez Perce Tribe as an exception does require tribal approval. The Acting Deputy Commissioner concluded that since the Nez Perce Tribal Executive Committee by Resolution NP 79-506 had gone on record as opposing the adoption of any members as exceptions to the Tribal Adoption Act, the Department had no alternative but to honor the Tribe's view. Resolution NP 76-210 was then returned to the Tribe without approval.

Acting Deputy Commissioner Krenzke's decision was reconsidered and a decision rendered by Acting Deputy Assistant Secretary of Indian Affairs, Ralph Reeser, on June 3, 1980, wherein he held there was no prohibition against the Acting Deputy Commissioner considering new evidence. He advised that the Bureau was especially concerned about the Tribe's viewpoint since enrollment is a matter affecting tribal sovereignty. Acting Deputy Assistant Secretary Reeser affirmed the decision of the Acting Deputy Commissioner, concluding that his determination was based on the exercise of discretionary authority and was final for the Department. Accordingly, the Board is without authority to further consider the question of tribal enrollment.

[2] The sole issue remaining is what is the proper valuation date and the fair market price to be paid by the Nez Perce Tribe for the allotted interests otherwise inherited by Cleo Hill from decedent, Antoine Hill?

The parties stipulated at the hearing held at Lapwai, Idaho, on December 15, 1977, that the date of taking on which this valuation should depend is either the date notice was given by the Northern Idaho Indian Agency to the Judge or by the Nez Perce Tribe to the Judge through the Northern Idaho Indian Agency of the Tribe's election to purchase or the date of the supplemental order of distribution issued by the Judge on October 15, 1976, vesting all rights, title, and interest in said trust properties as more fully described in the inventory of record in the United States in trust for the Nez Perce Tribe. In his order of May 2, 1978, Judge Burrowes relied on the latter date (October 15, 1976) in valuing the lands in question.

We conclude that it was proper for the Administrative Law Judge to rely on one of the two dates stipulated by the parties in determining fair market value.

Appellee, Cleo Hill, argues that the Tribe should be estopped from exercising any option to purchase because from December 12, 1972, date of probate hearing, until July 2, 1975, the Tribe took no action with respect to exercising its option to purchase.

There were no regulations in effect on December 12, 1972, nor on May 9, 1974, the date of Judge Snashall's order approving will and

decree of distribution, explaining how a tribe should accomplish an election for property under the Act of September 29, 1972. 2/ For this reason we previously found the regulations not to be controlling (Board's order of January 23, 1979, at p. 2). A caveat was included in Judge Snashall's decree of distribution indicating that the property in question may be subject to divestiture and staying distribution until September 29, 1974. On June 20, 1974, the Tribe requested an extension of time to facilitate funding. On June 24, 1974, Judge Snashall issued an order extending the time allowed for exercising tribal option to purchase until September 28, 1975. In response to a further request for an extension of time, Judge Snashall on September 18, 1975, extended the time for exercising tribal option to March 29, 1976. On March 29, 1976, in response to a request by the Northern Idaho Agency for an extension of time because of the Tribe's passage of Resolution NP 76-210, an extension was granted to September 29, 1976. Inventory and appraisal of the fair market value of decedent's estate at \$116,541.67 as determined by the Bureau of Indian Affairs was received by the Judge on March 22, 1976. The Northern Idaho Indian Agency journal vouchers were also received by the Judge on March 22, 1976, indicating that \$116,541.67 was paid by the Nez Perce Tribe and deposited into the individual money account of the decedent's estate. Judge Snashall issued a supplemental order on October 15, 1976, indicating the Tribe had exercised its option to purchase for \$116,541.67. Appellee, Cleo Hill, filed objections to the Judge's supplemental order on November 10, 1976.

Because of the facts in this case and the Board's finding that the implementing regulations effective September 30, 1974, were not controlling, we find nothing arbitrary or irregular in the chronological actions of the Judge referred to, supra, in extending the time for the Tribe to exercise its option to purchase.

We turn now to the question of the fair market value of the subject estate as of October 15, 1976. 3/

2/ Implementing regulations concerning the Act of September 29, 1972 (P.L. 92-443; 86 Stat. 744) became effective as of September 30, 1974 (39 FR 31636, August 30, 1974).

3/ Estate of Antoine Hill, Deceased Nez Perce Allottee No. 848, Inventory:

<u>Tract No.</u>	<u>Description</u>	<u>Fractional Interest</u>
182-237	Lots 5, 6, 7, 8, sec. 4, T. 35 N., R. 4 W., Boise meridian, Idaho, containing 82.60 acres	1/6
182-845	Lots 25, 26, 27, and 28, sec. 9, T. 34 N.) R. 1 W., Boise meridian, Idaho, containing 80 acres	1/1

The appraisal prepared by the Bureau of Indian Affairs on March 12, 1976, showed the fair market value of the property in question to be \$116,541.67. The appraisal prepared by Gary E. Meisner for appellee on January 26, 1977, showed the fair market value of the property in question to be \$164,299.20.

Judge Burrowes in his order found the regulations at 43 CFR 4.304, implementing the Act of September 29, 1972, to be controlling, and as such, the appraisal made by the Bureau of Indian Affairs not to be competent evidence of fair market value as of October 15, 1976. We have previously determined that the Departmental regulations implementing said Act are not controlling in this case. We conclude that the Bureau's appraisal may be considered as part of the overall record in determining fair market value as of October 15, 1976. See Estate of Cecilia Smith Vergote (Borger), Morris A. (K.) Charles and Caroline J. Charles (Brendale), 5 IBIA 96, 83 I.D. 209 (1976).

[3] The Board has independently evaluated all of the testimony and exhibits which were before Judge Burrowes and we find that the fair market value of the aforementioned interests as of October 15, 1976, is \$164,299, as he determined. In arriving at this finding, the Board is satisfied that the expert evidence of valuation presented by Gary E. Meisner is the best evidence available concerning fair market value. In accepting his appraisal, the Board rejects the Tribe's contention that the Nez Perce Inheritance Act requires valuations to be based on appraisals made by the Bureau of Indian Affairs.

It shall be ordered that within 20 days after the receipt of this decision by the Tribe, it must file with the Superintendent of the Northern Idaho Agency, a specific list of all interests it elects to take from appellee, Cleo Hill. It shall be conclusively presumed that the Tribe has released all claim to any interest not listed. The

fn. 3 (continued)

182-847	Lots 9, 10, 11, and 12, sec. 16, T. 34 N., R. 1 W., Boise meridian, Idaho, containing 80 acres	1/2
182-877	Lots 5, 6, 11, and 12, sec. 21, T. 34 N., R. 1 W., Boise meridian, Idaho, containing 80 acres	1/3
182-880	Lots 21, 22, sec. 21, T. 34 N., R. 1 W., Boise meridian, Idaho, containing 40 acres	1/3
182-1975	Lots 18, 19, 20, 29, 30, 31, and 32, sec. 27, T. 35 N., R. 3 W., Boise meridian, Idaho, containing 140 acres.	1/1

Tribe may decide that it does not want any of the property. If so, the Superintendent must be informed of such rejection within 20 days of receipt of this decision. In such event, the Tribe will be allowed full reimbursement for all money deposited toward the purchase of said interests. The Tribe has thus far deposited a total of \$116,541.67 toward the purchase of the interests in question.

The Tribe shall be obligated to pay the balance due (\$47,757.33) within 6 months of the date of this decision. The payment deadline may be extended for no more than one 6-month period for good cause shown.

Administrative Law Judge Keith L. Burrowes shall retain jurisdiction of this matter for 1 year to oversee the necessary transactions and rule on any extension request. Upon payment by the Tribe of the full fair market value, referred to supra, Judge Burrowes, after certification of said fact by the Superintendent, shall make a finding that the required fair market value has been paid and he shall issue a decision that the United States holds the title to such interests in trust for the Tribe.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order entered by Administrative Law Judge Keith L. Burrowes on May 2, 1978, is hereby modified in accordance with the terms herein prescribed.

This decision is final for the Department.

Mitchell J. Sabagh
Administrative Judge

We concur:

Franklin Arness
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

Attachment

IN THE MATTER OF THE ESTATE)	IBIA 78-15
OF ANTOINE HILL (Kenape))	
)	ORDER
)	
Deceased Nez Perce Allottee 848)	January 23, 1979

Antoine Hill died testate on December 12, 1972. An order approving will and decree of distribution was issued in the above-captioned estate on May 9, 1974. The sole devisee of the decedent's trust estate was found to be Cleo Frances Hill, granddaughter, at that time a Yakima enrollee. 1/ Said order included a caveat indicating that interests in the estate properties ordered distributed may be subject to divestiture by Nez Perce Tribal purchase pursuant to the Act of September 29, 1972 (P.L. 92-443; 86 Stat. 744), because said devisee was not then an enrolled member of the Nez Perce Tribe.

The Nez Perce Tribe did not exercise its option to purchase said interests in the above entitled estate until October 15, 1976. On November 9, 1976, devisee Cleo Hill petitioned for reconsideration.

Petitioner, among other things, maintained that as of the date the tribe exercised its option to purchase (October 15, 1976) she was an enrolled member of the Nez Perce Tribe. After the hearing held at Lapwai, Idaho, on December 15, 1977, Administrative Law Judge Keith L. Burrowes found that Cleo F. Hill was an enrolled member of the Nez Perce Tribe from and after February 10, 1976, by virtue of Resolution 76-210 adopted by the Nez Perce Tribal Executive Committee on February 10, 1976; and that the entitlement of the Nez Perce Tribe to purchase the interest of Ms. Hill under the Nez Perce Inheritance Act terminated as of that date. Judge Burrowes further found that only the ministerial act by the Superintendent, Bureau of Indian Affairs,

1/ Blood quantum of Cleo Frances Hill was 3/4 Nez Perce and 1/4 Yakima. Cleo Frances Hill was apparently enrolled as a Yakima when she was 3 years of age by her parents.

Northern Idaho Agency, to enroll and issue a number to Ms. Hill remained and the fact of enrollment was actually accomplished as of the date of the resolution. 2/

Judge Burrowes found that a later resolution, Resolution 76-400 adopted by the Nez Perce Tribal Executive Committee at its regular session on September 14, 15, 1976, rescinding Resolution 76-210 because of Ms. Hill's failure to meet certain conditions including the proper execution of a relinquishment of her Yakima enrollment and the disposition of heirship property therein, was null and void for the reasons included above and because the conditions recited in Resolution 76-400 were not included in Resolution 76-210 as a prerequisite to enrollment.

The Nez Perce Tribe filed a timely appeal with this Board contending in substance among other things that Judge Burrowes had no jurisdiction over the question of Tribal enrollment.

Judge Burrowes apparently concluded that his jurisdiction over the matter of enrollment stemmed from 43 CFR section 4.300(b)(2) of the rules and regulations concerning the Nez Perce Inheritance Act which were published on August 30, 1974, effective September 30, 1974.

After due consideration of the complete record in the matter the Board finds the regulations at 43 CFR 4.300 et seq. not to be controlling. See Estates of Cecilia Smith Vergote (Borger) et al., 5 IBIA 96, 105; 83 I.D. 209, 212-213 (1976) and Estate of Temens (Timens) Vivian Gardafee, 5 IBIA 113, 117; 83 I.D. 216, 218 (1976). Having found the foregoing regulations not to be controlling the Board further finds that the question of tribal enrollment is within the jurisdiction of the Acting Commissioner of Indian Affairs pursuant to 25 CFR Subchapter F, and that Judge Burrowes was and is without jurisdiction to resolve the question of Ms. Hill's enrollment in the Nez Perce Tribe.

Because the matter of Tribal enrollment is within the purview of the Acting Commissioner of Indian Affairs the question of whether Ms. Hill is or is not an enrolled member of the Nez Perce Tribe should be referred to the Acting-Commissioner of Indian Affairs, Attention: Tribal Enrollment Division, for expeditious resolution and return. The decision should include findings of fact and conclusions, for incorporation in the Board's decision disposing of the overall matter finally for the Department.

2/ See Revised Constitution and By Laws of the Nez Perce Tribe of Idaho, Article VIII, Section 2(d) and Section 3.

NOW, THEREFORE, the matter of Tribal enrollment, i.e., enrollment of Cleo Frances Hill in the Nez Perce Tribe is referred to the Acting Commissioner of Indian Affairs, Attention: Tribal Enrollment Division, for expeditious resolution and return to this Board for incorporation in its decision disposing of the overall matter finally for the Department. 3/

Mitchell J. Sabagh
Administrative Judge

We concur:

Wm. Philip Horton
Administrative Judge

Alexander H. Wilson
Chief Administrative Judge

3/ Enclosed with the Acting Commissioner's copy of this order are the following documents deemed relevant and pertinent to the enrollment issue: Judge Burrowes' order of May 2, 1978, and accompanying Discussion, Findings of Fact and Conclusions of Law; Relinquishments from Yakima Tribal rolls dated September 23, 1975, and February 20, 1976, and Resolution Nos. 76-210 and 76-400.

The probate record of which the foregoing documents are a part, is available for examination if necessary in the office of the Board of Indian Appeals.